38409 SERVICE DATE – AUGUST 27, 2008
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35082[1]

VICTOR WHEELER, ET AL.–PETITION FOR DECLARATORY ORDER–
RAIL LINE IN ERIE COUNTY, PA

DECISION AND NOTICE OF INTERIM TRAIL USE

Docket No. AB-88 (Sub-No. 5X)

BESSEMER AND LAKE ERIE RAILROAD COMPANY–
ABANDONMENT EXEMPTION–IN ERIE COUNTY, PA

Decided: August 26, 2008

On September 24, 2007, pursuant to a referral decision and order issued by the United States District Court for the Western District of Pennsylvania (District Court) in Victoria Wheeler, et al., v. Material Recovery of Erie, Inc., et al., C.A. No. 06-85 Erie (W.D. Pa. Mar. 30, 2007) (Memorandum Opinion),[2] Petitioners, who are adjacent property owners,[3] filed a petition for declaratory order in STB Finance Docket No. 35082, asking us to determine the status of a 5.73-mile rail banked right-of-way located between Survey Station 308+85 near Lexington and Survey Station 6+00 near Lake City in Erie County, PA. Northwest Pennsylvania Trail Association (NWPTA), Pennsylvania Electric Company (Penelec), and Material Recovery of Erie, Inc. (MR) (collectively, Trail Proponents) jointly replied on October 4, 2007.

On October 9, 2007, NWPTA and MR filed a joint motion under 49 CFR 1152.29(f) requesting us to: (1) reopen Docket No. AB-88 (Sub-No. 5X); (2) vacate the existing Notice of Interim Trail Use or Abandonment (NITU) naming MR as the interim trail sponsor; and (3) issue a replacement NITU naming NWPTA as the interim trail sponsor (Joint Motion). Included with the Joint Motion is a statement of willingness of NWPTA to assume financial responsibility for

---

[1] These proceedings are not consolidated. A single decision is being issued for administrative convenience.

[2] The District Court's referral decision and order were submitted as Exhibit G to the Petition for Declaratory Order.

[3] The Petition for Declaratory Order identifies the owners as Victor Wheeler and Sandra J. Wheeler; James K. Sisson and Nancy A. Sisson; Bruce D. Redfield III and Tamara J. Redfield; and David A. Warner and Tina M. Warner (collectively, Petitioners).

the right-of-way.[4] Petitioners replied on October 25, 2007, also requesting us to reopen Docket No. AB-88 (Sub-No 5X) and to vacate the NITU on the ground of material error in that the line previously had been abandoned or on the grounds that MR failed to comply with Board regulations regarding interim trail use.

With respect to the petition for declaratory order, in this decision we determine that the right-of-way continues to be subject to interim trail use under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). To the extent Petitioners request reopening of Docket No. AB-88 (Sub-No. 5X), we deny that request. We grant NWPTA and MR's request to reopen that proceeding to allow NWPTA to replace MR as the interim trail sponsor.

BACKGROUND

In 1973, the Board's predecessor – the Interstate Commerce Commission (ICC) – issued a decision authorizing the Trustees of the Penn Central Transportation Company (Penn Central) to "abandon" a 38.7-mile rail line between milepost 129.2, near Girard Junction, and milepost 90.5, near Jamestown, PA, which consisted of tracks and right-of-way owned by the Erie & Pittsburgh Railroad Company (E&P)[5] and leased to the Penn Central, including the line at issue here. See George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and William Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor, Abandonment Between Girard Junction and Jamestown in Mercer, Crawford and Erie Counties, PA, Docket No. AB-5 (Sub-No. 22) (ICC served Feb. 7, 1973) (Penn Central Abandonment). The decision indicated that only 14 carloads had moved over the line in the prior year. The ICC's authorization to cease operations on the line was subsequently stayed by Penn Central's bankruptcy.[6]

In 1974, Congress passed the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (3R Act). The 3R Act was enacted to reorganize the Penn Central (and the other bankrupt railroads in the northeast) and establish procedures for disposing of rail properties operated by those railroads, including the right-of-way at issue here. The line was listed by the United States Railway Association (USRA) as rail property in the Preliminary

[4] See Exhibit 1 to the Joint Motion.

[5] As we discuss later, because the line was owned by E&P, a subsidiary of Penn Central, and not Penn Central itself, the ICC's decision effectively authorized only Penn Central's discontinuance of service over the line. E&P was included in the Penn Central Bankruptcy as a lessor of Penn Central lines. See Penn Central Transportation Company Reorganization, 347 I.C.C. 45, 51 (1973).

[6] See Petition for Declaratory Order at 4.

System Plan (PSP) and Final System Plan (FSP) as USRA Line Nos. 360 and 360a.[7] USRA Line No. 360 was described in the FSP as a 13.1-mile portion of the Jamestown Secondary Track, extending from Jamestown (milepost 90.5) to Linesville, PA (milepost 103.6).[8] USRA Line No. 360a was described in the FSP as an out-of-service line, extending from Linesville (milepost 103.6) to Thornton, PA (milepost 129.3),[9] which included the line at issue here. The FSP indicated that neither line was designated for transfer to the Consolidated Rail Corporation (Conrail). Penn Central's Trustees gave notice that Penn Central intended to terminate all rail service on Line No. 360a (called the "E&P Branch" in the notice), between Linesville (milepost 103.6) and Thornton Junction, PA (milepost 129.3), effective February 27, 1976, noting that the FSP did not designate this line for continued operation by Conrail or any other carrier.[10]

However, the FSP also designated a portion of USRA Line No. 360a as USRA Line No. 2423. USRA Line No. 2423, which included the right-of-way involved in this proceeding, extended between Lexington (milepost 123.5) and Thornton, PA (milepost 129.3). The FSP assigned a different line number to this portion of Line 360a to denote the fact that the line was owned by E&P and merely leased by Penn Central.[11] USRA Line 2423 was designated as rail property to be offered for sale to the Bessemer and Lake Erie Railroad Company (BLE).[12] On March 29, 1976, the E&P Trustee transferred the right-of-way to BLE, pursuant to section 206(c)(1)(B) of the 3R Act, which required that the FSP resolve the future status of the lines of the bankrupt northeast railroads.[13]

Although the line was a rail line subject to ICC jurisdiction, BLE never operated the line, according to the record, but dismantled and removed additional rail structures. In 1989, BLE filed a notice of exemption under 49 CFR 1152, Subpart F, in Docket No. AB-88 (Sub-No. 5X) to abandon the 5.73-mile segment now at issue in STB Finance Docket No. 35802, as an out-of-

---

[7] The PSP refers to the ICC abandonment proceeding in Penn Central Abandonment when describing USRA Line No. 360, at Volume II at 752.

[8] See Volume II of the FSP at 418.

[9] See Volume II of the FSP at 502.

[10] See Exhibit F to the Petition for Declaratory Order.

[11] See Volume I of the FSP at 293.

[12] The Canadian National Railway Company and Grand Trunk Corporation acquired control of BLE in 2004. See Canadian National Railway Company and Grand Trunk Corporation–Control–Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and The Pittsburgh & Conneaut Dock Company, STB Finance Docket No. 34424 (STB served Apr. 9, 2004).

[13] See BLE's Verified Notice of Exemption in Docket No. AB-88 (Sub-No. 5X).

service rail line. Notice of the exemption was served and published in the Federal Register on December 5, 1989 (54 FR 50284). On December 21, 1989, MR filed a request for issuance of a trail use condition to enable it to negotiate an interim trail use agreement with BLE under the Trails Act and the ICC's implementing regulations at 49 CFR 1152.29. A decision and NITU was served on January 8, 1990, discontinuing BLE's obligation to provide service on that line, and authorizing BLE to negotiate an interim trail use agreement with MR. Pursuant to that authority, MR acquired the line segment at issue from BLE for interim trail use/rail banking. MR subsequently salvaged what structures remained on the line, and removed ballast and fill, but did not develop the right-of-way as a trail.

In 1997, MR filed for bankruptcy in the United States Bankruptcy Court for the Western District of Pennsylvania (Bankruptcy Court).[14] As part of the bankruptcy, MR sought to convey the right-of-way to Penelec. Petitioners had objected to the proposed conveyance to Penelec, claiming that their reversionary interests in the right-of-way had vested. The Bankruptcy Court referred that issue to the Board. In a decision in Docket No. AB-88 (Sub-No. 5X) served on May 28, 1997 (1997 Board Order), the Board concluded that the right-of-way had been properly transferred from BLE to MR under the NITU issued in 1990, and that the property had not reverted to the Petitioners. The decision acknowledged that the Bankruptcy Court was responsible for a final determination of legal ownership of the right-of-way property, making the Board's decision advisory to the Bankruptcy Court. The Board indicated that, if the Bankruptcy Court were to permit the sale of the right-of-way to Penelec, Penelec would be required to comply with 49 CFR 1152.29(f) to ensure that the right-of-way would continue to be rail banked pursuant to the Trails Act.

Subsequently, MR decided to grant an easement interest in the right-of-way to Penelec rather than selling the right-of-way outright. In a decision issued on November 30, 1999, the Bankruptcy Court approved the MR proposal to convey an easement interest to Penelec, but the court made no determination of adjoining property owners' rights.[15] MR conveyed an easement to Penelec in an agreement dated February 17, 2000, but MR remained the owner and financially responsible party for the trail.[16]

On September 20, 2005, MR and NWPTA entered into both an agreement for NWPTA to purchase real property from MR that was not part of this trail and a Donation Agreement that provided for the future transfer of this trail to NWPTA.[17] The Donation Agreement specified that MR's obligation to transfer the property was contingent upon the completion and filing of all

[14] In Re Material Recovery of Erie, Inc., Bankruptcy No. 94-10812 (Bankr. W.D. PA).

[15] See Exhibit 3 to the Joint Motion.

[16] See Exhibit 5 to the Joint Motion.

[17] See Exhibit 6 to the Joint Motion.

necessary rail banking documents with the Board to preserve the property's interim trail status. The Donation Agreement also provided for MR to lease the right-of-way to NWPTA for use for any lawful purpose associated with the activities of NWPTA until the property was transferred. NWPTA agreed to maintain the right-of-way, pay real estate taxes, and provide liability insurance. In an agreement dated October 5, 2007, MR and NWPTA reaffirmed and extended the terms of the Donation Agreement and specified that MR would continue to retain primary responsibility for the trail pursuant to 49 CFR 1152.29 until Board approval of the Joint Motion now before us.[18]

On April 11, 2006, Petitioners filed a complaint before the District Court claiming that MR and NWPTA had violated the provisions of 49 CFR 1152.29(f) by transferring ownership of the trail without fulfilling the requisite regulatory requirements.[19] As noted, the District Court referred the matter to the Board for further proceedings. In particular, the court stated that the STB is best suited to consider the following issues: "whether the Donation Agreement and subsequent use of the Trail by the NWPTA triggered the requirements of 49 CFR 1152.29, whether 1997 STB Order has been violated, and ultimately, whether either of those events might result in an abandonment and reversion of the Trail to the Plaintiff property owners." Memorandum Opinion at 7.

PRELIMINARY MATTERS

Petitioners requested concurrent and expedited consideration of these proceedings. As part of that request, they suggested that discovery be concluded by May 30, 2008, and that an oral hearing be held by September 30, 2008. Petitioners assert that the issues raised are complex, that the documentation and evidence submitted by the parties is inadequate, and that NWPTA and MR are going forward developing a trail. NWPTA and MR have responded, opposing oral hearing and pointing out that all plans to commence construction of the trail have ceased pending resolution of these proceedings before this agency and the federal courts.

We are considering these proceedings concurrently, but otherwise denying Petitioners' request. Discovery is not typically conducted in declaratory order proceedings; moreover, presumably Petitioners have had ample opportunity to engage in discovery in the District Court proceeding and have not indicated what, if any, additional material they wish to obtain through discovery at this time.

Regarding the request for oral hearing, Petitioners have not demonstrated that there are any material matters in dispute that cannot be adequately considered and resolved based on written submissions. The parties have submitted extensive information in their filings. In addition, pursuant to 49 CFR 1114.6, we may take notice of information pertaining to the line

[18] See Exhibit 8 to the Joint Motion.

[19] See Exhibit H to the Petition for Declaratory Order.

contained in prior agency decisions and in the notice of exemption filed by the BLE in Docket No. AB-88 (Sub-No. 5X) on November 15, 1989. We also may take notice of pertinent information about this line that is contained in the PSP and the FSP. We therefore are satisfied that we have sufficient information with which to resolve the issues referred to us by the District Court.

We now turn to the standard under which the petition will be considered. Although Petitioners styled their request as a petition for a declaratory order, one of the issues Petitioners raise has already been addressed by the Board in the 1997 Board Order in Docket No. AB-88 (Sub-No. 5X). Petitioners essentially argue that the Board erred in the 1997 Board Order in concluding that the NITU was imposed before the right-of-way was authorized for abandonment and that the property had not reverted back to the landowners prior to that event. Accordingly, the portion of Petitioner's request regarding whether the right-of-way had been abandoned prior to being rail banked will be treated as a petition to reopen the 1997 Board Order and will be governed by our standards for evaluating such motions. See 49 U.S.C. 722(c); 49 CFR 1115.4.[20]

The remainder of Petitioners' pleading will be treated as a petition for a declaratory order. Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty.

DISCUSSION AND CONCLUSIONS

Was the line abandoned prior to being rail banked?

In arguing that the right-of-way was abandoned prior to being rail banked, Petitioners offer no new evidence or changed circumstances, but in essence assert that our 1997 conclusion to the contrary was material error.[21] We disagree.

In support of their assertion, Petitioners first point to the ICC's decision in Penn Central Abandonment, which authorized abandonment of the 38.7-mile rail line between milepost 129.2, near Girard Junction, and milepost 90.5, near Jamestown, PA. Petitioners also refer to the notice

[20] Petitioners argue that they have not "waived" the right to raise the rail banking and ownership issues because the 1997 Board Order recognized that the Bankruptcy Court retained jurisdiction to determine the ownership of the line and was characterized as an "advisory" opinion. See Petition at 9-10. While the Bankruptcy Court was not bound by the Board's determinations, the 1997 Board Order was issued to terminate a controversy and remove uncertainty with regard to the Board's position on the property's rail banked status. Thus, the conclusions reached by the Board in that decision reflected a final determination by the Board on that issue. So when Petitioners argue to us that the Board was wrong in that decision, they are necessarily asking us to reopen that proceeding to reconsider that determination.

[21] See 49 U.S.C. 772(c); 49 CFR 1115.4.

issued by Penn Central's Trustee, indicating the carrier's intention to discontinue service on the portion between Linesville (milepost 103.6) and Thornton Junction, PA (milepost 129.3), effective February 27, 1976. Petitioners further argue that the FSP did not designate the subject line to be conveyed to Conrail or any other rail carrier. And, according to Petitioners, Penn Central effected abandonment when it ceased service, dismantled bridges, crossings and other rail structures, and severed connections between the subject line and other active rail lines.

We reject Petitioners' contention that Penn Central previously abandoned the subject line. As Petitioners acknowledge, the ICC's decision authorizing the abandonment was stayed by the Penn Central bankruptcy. The decision was subsequently rendered inoperative by the enactment of the 3R Act, which established procedures for reorganizing the Penn Central and other bankrupt rail carriers and for disposing of the rail properties operated by those carriers. But even if the Penn Central had exercised the authority granted in Penn Central Abandonment, all that decision could have authorized was for Penn Central to discontinue service on the line, not abandon it, because Penn Central did not own the line. As the ICC's decision recognized, the tracks and right-of-way over which Penn Central operated were owned by the E&P, and E&P's interests were not before the ICC in the proceeding in which the Penn Central was authorized to discontinue its operations over the line. As owner and lessor, E&P continued to hold a residual common carrier obligation to operate the line after Penn Central was relieved of its obligation.[22] Thus, the line remained subject to our jurisdiction because E&P had not obtained abandonment authority.

Under the 3R Act, USRA was charged with determining in the FSP the disposition of the rail properties operated by the Penn Central and other bankrupt railroads in the Northeast. Section 206 of the 3R Act, codified at 49 U.S.C. 716, required that the FSP designate which rail properties would be: (1) transferred to Conrail; (2) offered for sale to a profitable railroad operating in the region; (3) acquired by the National Railroad Passenger Corporation; (4) acquired by a State or local regional transportation authority for commuter service; and (5) suitable for other public purposes. For those lines that were not designated for continued rail service in the FSP, section 304 of the 3R Act, codified at 49 U.S.C. 744, permitted, with certain exceptions, the summary discontinuance of operations upon 60 days' notice to the ICC and certain parties. Abandonment of a line, with certain exceptions, was allowed 120 days after the discontinuance, upon giving 30 days' notice to the ICC and certain parties. ICC approval was not required for discontinuance and abandonment of rail properties that were not designated by the FSP for continued rail service.

Because the FSP did not designate USRA Line Nos. 360 and 360a as Penn Central rail property to be continued in service, Penn Central could have discontinued its service on these

[22] See Erie R. Co. Acquisition, 275 I.C.C. 679, 687 (1950); Hoboken Rail Road, Whse. & S. S. Connecting Co. Operation, 257 I.C.C. 739, 743 (1944); Lehigh Valley R. Co. Abandonment of Operation, 202 I.C.C. 659, 663 (1935).

lines pursuant to the 3R Act. Penn Central's Trustees did in fact provide notice pursuant to section 304(a) of the 3R Act that rail service would be terminated on USRA Line No. 360a effective February 27, 1976.

However, the FSP also designated USRA Line No. 2423, which overlapped with USRA 360a and also included the line at issue here, as E&P rail property that was to be offered for sale to BLE. Pursuant to the FSP, on March 29, 1976, BLE accepted the offer and acquired the property designated as USRA Line No. 2423, along with the residual common carrier obligation held by E&P as owner and lessor of the line. Although it never actually had any traffic on this line, BLE had a common carrier obligation to provide rail service on this line upon request until it was relieved of that obligation by the NITU that was served by the ICC on January 8, 1990, in Docket No. AB-88 (Sub-No. 5X). Accordingly, there was no authority for the line to be abandoned that had been exercised prior to the issuance of the NITU.

Petitioners next assert that abandonment was effected when rail structures were removed by Penn Central prior to the issuance of the NITU. However, the removal of rail structures and salvaging of rails and ties is not dispositive evidence of abandonment in this case. Because E&P, and later BLE, still had a common carrier obligation over the line, they could have been required to replace any rail structures that were removed and provide service if a reasonable request for service had been made. See BNSF Railway Co. – Abandonment Exemption – In Clay County, MO, STB AB-6 (Sub-No. 450X) (STB served Aug. 20, 2007); Central Oregon & Pacific Railroad, Inc. – Coos Bay Rail Line, STB Finance Docket No. 35130, slip op. at 3 (STB served Apr. 11, 2008). Moreover, the record shows that, while rail structures were removed, the subject right-of-way remained intact and could be reconnected to the interstate rail network. Maps submitted with the Joint Motion show that the right-of-way involved here continues to cross several rail lines.

In sum, none of Petitioners' arguments warrant reopening the 1997 Board Order on the ground of material error. The subject line was conveyed by the E&P Trustee to BLE as a line of railroad (albeit an unused line at the time) subject to ICC jurisdiction. The status of the line remained unchanged until the ICC served the NITU in Docket No. AB-88 (Sub-No. 5X), authorizing BLE's service obligation to be discontinued and permitting BLE to enter into an interim trail use/rail banking agreement with MR pursuant to the provisions of the Trails Act. Consistent with the NITU and the Trails Act, BLE and MR entered into an agreement to rail bank the line, and MR acquired the subject right-of-way from BLE pursuant to that agreement. Thus, the record shows that the line had not been abandoned and the Board had not lost jurisdiction over the property prior to its being rail banked.

Trails Act requirements.

Petitioners assert that MR has failed to meet its financial, legal and managerial obligations for the right-of-way. Petitioners also contend that MR and NWPTA have violated the provisions of 49 CFR 1152.29(f) and the 1997 Board Order by transferring ownership of the

trail without fulfilling the requisite regulatory requirements. We find that Petitioners' assertions lack merit.

The Trails Act "is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." Preseault v. ICC, 494 U.S. 1, 5 (1990). Under the Trails Act, the Board must "preserve established railroad rights-of-way for future reactivation of rail service" by prohibiting abandonment where a trail sponsor agrees to assume full managerial, tax, and legal liability for the right-of-way for use in the interim as a trail. See 16 U.S.C. 1247(d); Citizens Against Rails to Trails v. STB, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001) (CART). The statute expressly provides that "if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for [any] purposes . . . as an abandonment . . . ." 16 U.S.C. 1247(d). Instead, the right-of-way is rail banked, which means that the railroad is relieved of the current obligation to provide service over the line but that the railroad (or any other approved rail carrier) may reassert control over the right-of-way to restore service on the line in the future. See Birt, 90 F.3d at 583; Iowa Power–Const. Exempt.–Council Bluffs, IA, 8 I.C.C.2d 858, 866-67 (1990); 49 CFR 1152.29.

The Board's role under the Trails Act is limited and ministerial. See CART; Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990). When a request for a NITU is filed, our only responsibility is to confirm that the trail sponsor agrees to assume full liability for the property during the interim trail use and to keep the property available for reactivation of rail service. 16 U.S.C. 1247(d); 49 CFR 1152.29(a)(3). We do not decide whether interim trail use is desirable for a particular line. Moreover, we have no involvement in the type, level, or condition of the trail that is used for a particular right-of-way, and we are not authorized to regulate activities on the trail. See Georgia Great Southern Division – Abandonment and Discontinuance Exemption – Between Albany and Dawson, In Terrell, Lee, and Dougherty Counties, GA, Docket No. AB-389 (Sub-No. 1X), slip op. at 5-6 (STB served May 16, 2003). We can revoke a trail condition only if it is shown that the statutory requirements are not being met (i.e., the Trails Act was not available or the trail sponsor is not meeting its financial obligations for the property or is failing to adequately manage the trail). See Jost v. STB, 194 F.3d 79, 89-90 (D.C. Cir. 1999); Central Kansas at 6-7; Idaho Northern et al.–Abandonment & Discon. Exemption, 3 S.T.B. 50 (1998).

Asserted failure to create a trail.

Petitioners contend that MR violated the trail use condition by failing to create a trail after it had been authorized to acquire the right-of-way for interim trail use/rail banking. However, the Trails Act does not require that a trail be developed in any particular way, and there is no time limit for how quickly a trail must be developed to its intended level of use. See, e.g., Idaho Northern, 3 S.T.B. at 59; Missouri Pacific Railroad Company–Abandonment in Okmulgee, Okfuskee, Hughes, Pontotoc, Coal , Johnson, Atoka, and Bryan Counties, OK, Docket No. AB-3 (Sub-No. 63) (ICC served Jan. 4, 1991). Thus, the Board does not become involved in determining whether the trail type or level of development is adequate. Rather, the

Board's chief concern is that "nothing occur that would preclude a railroad's right to reassert control over the right-of-way at some future time to revive active service." Idaho Northern, 3 S.T.B. at 59.

Here, the record demonstrates that the right-of-way has remained intact. Moreover, petitioners have not introduced any evidence that MR has taken any action with regard to trail development that would cause us to consider revoking the NITU.

Asserted failure to meet financial obligations.

Petitioners claim that MR has "repeatedly" failed to meet its financial and legal obligations relating to the trail. To support this assertion, Petitioners cite a single letter, dated November 10, 1999, from the Girard County Tax Collector stating that MR did not pay taxes for property located in the township of Girard during the tax year of 1998.[23] The letter cites only the tax year of 1998, which was shortly after MR declared bankruptcy, and it notes that information on the failure to pay was turned over to Erie County.

This does not constitute sufficient evidence to support a finding that MR has failed, or is likely to fail, to meet its financial and legal obligations. The sole instance of failure to pay county taxes cited by Petitioners was from 10 years ago, and Petitioners have provided no evidence suggesting that MR has never satisfied that obligation, that it is currently in arrears with regard to any financial obligation regarding the right-of-way, or that it is likely to become so.

Asserted transfer of the right-of-way.

In their Joint Motion, MR and NWPTA request that NWPTA be substituted as the new interim trail user, pursuant to 49 CFR 1152.29(f)(1), and that MR be terminated as the interim trail user for this 5.73-mile right-of-way. NWPTA has submitted a statement of willingness to assume financial responsibility for interim trail use/rail banking in compliance with 49 CFR 1152.29 and acknowledged that the use of the right-of-way as a trail is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

Petitioners challenge the proposed transfer of the right-of-way from MR to NWPTA on the ground that the property has already been transferred without the necessary Board authorization. They point to the provision in the Donation Agreement for MR to lease the right-of-way to NWPTA and NWPTA's agreement to maintain the property, pay all real estate taxes and use the property as a trail during the period of the lease. Petitioners also point to several newspaper articles from February 2006 quoting an official with NWPTA as stating that the trail property had been deeded to NWPTA.[24] Petitioners argue that these actions not only

[23] See Exhibit C to the Petition for Declaratory Order.

[24] See Exhibits I and J to the Petition for Declaratory Order.

violated the trail use condition but resulted in abandonment of the line and the vesting of their reversionary interests in the right-of-way.

In their response, MR and NWPTA maintain that, while the Donation Agreement contemplated the future donation of the right-of-way to NWPTA, it provided for MR to remain the owner of the right-of-way until the Board has approved the Joint Motion. The Donation Agreement also provides that the conveyance would occur within 30 days after the Board's final approval of the Joint Motion. MR and NWPTA acknowledge that the Donation Agreement permits NWPTA to enjoy the beneficial use of the right-of-way as a trail while the parties complete all necessary rail banking documents and filings with the Board to preserve the right-of-way's interim trail status. They note, however, that MR has remained the record owner of the right-of-way and the financially responsible party.

We do not find that the actions of MR and NWPTA have resulted in the abandonment of the line. As noted, Congress passed the Trails Act in order to preserve railroad rights-of-way for future reactivation of rail services by providing a means for their interim use as trails. Consistent with the intent of the Trails Act, the Donation Agreement preserves the subject right-of-way for interim trail use/rail banking by providing for the transfer of the right-of-way to NWPTA after our approval. The lease arrangement permitting NWPTA to use and maintain the right-of-way and pay taxes in the meantime is a reasonable means for preserving the right-of-way for interim trail use/rail banking, with MR continuing to bear ultimate financial responsibility until approval of the transfer of the property is obtained.[25]

Even if Petitioners were correct in their assertion that the Donation Agreement placed more financial responsibility on NWPTA than a more standard lease, it does not follow that this would automatically result in the abandonment of the line or otherwise cause us to lose jurisdiction over the property as a rail right-of-way. Indeed, here the Donation Agreement expressly states that the line would not be conveyed to NWPTA until Board approval has been obtained, and MR and NWPTA have sought such approval.

We conclude that the right-of-way remains subject to interim trail use under the Trails Act. Because MR and NWPTA have now met the requirements of 49 CFR 1152.29(f) to substitute NWPTA for MR as interim trail sponsor, Docket No. AB-88 (Sub-No. 5X) will be reopened to the limited extent of substituting NWPTA for MR as the interim trail sponsor for the subject right-of-way.

[25] The characterization of the Donation Agreement in the newspaper articles cited by Petitioners does not negate the fact that the agreement itself expressly requires that STB approval be obtained before the transfer occurs.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Petitioners' request regarding discovery and oral hearing is denied.

2. The petition in STB Finance Docket No. 35082 is granted to the extent that this decision addresses the issues referred by the District Court, and is denied with respect to the relief sought by Petitioners.

3. Docket No. AB-88 (Sub-No. 5X) is reopened to the limited extent of replacing the NITU served on January 8, 1990, with a replacement NITU substituting NWPTA as interim trial sponsor.

4. NWPTA is required to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless it is immune from liability, in which case it must indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service and to the new sponsor's continuing to meet the financial obligations for the right-of-way.

6. If and when the new trail sponsor decides to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. This decision and notice is effective on its service date.

8. A copy of this decision and notice will be mailed to:

The Honorable Sean J. McLaughlin
United States District Court
Western District of Pennsylvania
P.O. Box 1820
Erie, PA. 16507

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary